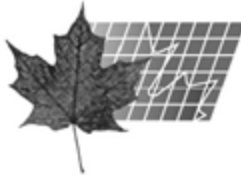


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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2019 TMOB 37

Date of Decision: 2019-04-08

IN THE MATTER OF A SECTION 45 PROCEEDING

R. William Wray & Associates

Requesting Party

and

Rex Inc.

Registered Owner

TMA501,946 for BADR

Registration

INTRODUCTION

[1] At the request of R. William Wray & Associates (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on October 31, 2016 to Rex Inc. (the Owner) the registered owner of registration No. TMA501,946 for the trade-mark BADR (the Mark).

[2] The Mark is registered in association with the following goods:

Great northern beans, mung beans, garbanzo beans, red lentils, green lentils, black eye peas, yellow split peas, barley, soft wheat kernel, dry vermicelli, roasted vermicelli, cumin seeds, turmeric, spice for rice, BBQ powder, black caraway seeds, black pepper, white pepper, cardamom green, cayenne pepper, cloves, coriander, curry powder, fish powder, garlic granulated, marjoram ground, kabob seasoning, shallots, barberry, saffron, quince preserve, rose petal jam, sour cherry preserve, carrot preserve, fig preserve, 3 fruit

jam, cucumbers pickled, garlic pickled, shallots pickled, mixed vegetables pickled, egg plants pickled, sour cherry syrup, quince syrup, orange blossom syrup, rose syrup, lemon syrup, pomegranate paste, pomegranate molasses, grape molasses, date molasses, tamarind paste, sabzi ghormah (dehydrated dried vegetables), sabzi polo (dehydrated dried vegetables), sabzi kookoo (dehydrated dried vegetables), sabzi aash (dehydrated dried vegetables), dillweed, fenugreek, savory leaves, mint cut, cilantro leaves, basil leaves, leeks, spinach flakes, tarragon leaves, rose water, mint water, willow water, taroonah water, kashni water, shahtareh water, sour grape juice, pomegranate juice, lime juice, lemon juice, mango juice, tamarind juice, apricot juice, noodle veggie soup, barley and 7 spice soup, golden prune, sour cherry dried, mulberries, barberry, fruit layers, wheat flour, rice flour, chick pea flour, baking powder, pure honey, pure honey with comb, pure light honey, white basmati rice, and Thai jasmine rice.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the goods specified in the registration at any time within the three year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of such use since that date. In this case, the relevant period for showing use is between October 31, 2013 and October 31, 2016.

[4] The relevant definition of “use” in association with goods is set out in section 4 of the Act as follows:

4(1) A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

[5] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for removing “deadwood” from the register and, as such, the evidentiary threshold that the registered owner must meet is quite low [*Uvex Toko Canada Ltd v Performance Apparel Corp*, 2004 FC 448, 31 CPR (4th) 270].

[6] In response to the Registrar’s notice, the Owner furnished the affidavit of Arash Missaghi sworn on May 29, 2017 in Toronto, Ontario (the Missaghi Affidavit). Neither party filed written representations. An oral hearing was not requested.

OVERVIEW OF THE EVIDENCE

[7] In his affidavit, Mr. Missaghi identifies himself as the manager of the Owner and indicates that from October 12, 2004 to the present, including for the duration of the relevant period, the Owner has licensed Top Natural Foods Inc. to use the Mark in Canada in association with the goods listed in the registration. A copy of the license agreement between the Owner and Top Natural in respect of the Mark is included as Exhibit C to the Missaghi Affidavit. The license agreement includes clauses related to quality control in respect of the goods sold by Top Natural and the Owner's right of inspection. As such, for the purpose of this proceeding, I accept that any evidenced use of the Mark by Top Natural enures to the benefit of the Owner pursuant to section 50 of the Act.

[8] In this respect, paragraph 12 of the Missaghi Affidavit indicates that Top Natural sold each of the goods listed in the registration to retailers during the relevant period, each good bearing the Mark as registered. Numerous invoices from the sale of the registered goods from Top Natural to various retailers in Canada during the relevant period are included as Exhibits I and J. The goods are identified in the body of the invoices as "Badr Brand".

[9] Furthermore, representative photographs of nearly all of the registered goods bearing the Mark on their packaging are included in Exhibits D1 through D93 to the Missaghi Affidavit.

[10] I note that in some instances the description of the good on the product packaging seen in Exhibits D1 through D93 does not appear to match the description of the good in the registration; however, in these instances, Mr. Missaghi provides an explanation as to why the descriptions are in fact equivalent. For example, in Exhibit D3, the depicted BADR product is identified as "Chick Pea" on the packaging; however, at paragraph 7.3 of his affidavit, Mr. Missaghi explains that this product correlates to the registered good "garbanzo beans".

[11] In addition, for certain of the registered goods there is no photograph of the product bearing the Mark included in the Missaghi Affidavit. However, in those instances, the relevant good is identified within the body of an invoice to a Canadian retailer dated during the relevant period, in Exhibit I or J. For example, Exhibit D36 to the Missaghi Affidavit relates to the good "3 fruit jam". While no photograph of this product bearing the Mark is included in the affidavit,

a good identified as “3 Fruit Jam (Badr Brand)” is included in the body of an invoice dated April 14, 2015 from Top Natural to Ava Food Market of Toronto, Ontario (included in Exhibit I to the Missaghi Affidavit).

[12] The Missaghi Affidavit also includes as exhibits other promotional items bearing the Mark, which Mr. Missaghi indicates were distributed to Canadian retail stores during the relevant period, including a poster, brochure and price list.

ANALYSIS

[13] The evidence provided in this case is extensive and detailed. Mr. Missaghi’s assertion of use is supported by the evidenced photographs and invoices, showing sales in the normal course of trade to various Canadian retailers during the relevant period. The exhibited photographs show that the packaging of such goods prominently displayed the Mark.

[14] In the absence of representations from the Requesting Party, I accept that Mr. Missaghi’s affidavit addresses all of the registered goods, and that the goods indicated on the exhibited invoices and depicted in the exhibited photographs correspond to the registered goods, as detailed by Mr. Missaghi.

[15] In view of the foregoing, I am satisfied that the Owner has demonstrated use of the Mark in association with all of the registered goods within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[16] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be maintained in compliance with the provisions of section 45 of the Act.

Andrew Bene
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

No Hearing Held

AGENTS OF RECORD

Taras Kulish

For the Registered Owner

R. William Wray & Associates

For the Requesting Party